No. 2899

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE UNITED REAL ESTATE AND TRUST COMPANY, a corporation,

Appellant,

vs.

LUCIEN A. BLOCHMAN, UNION TITLE COMPANY OF SAN DIEGO, formerly UNION TITLE AND TRUST COMPANY, a corporation, UNION TRUST COMPANY OF SAN DIEGO, a corporation, LA BINDA PARK SYNDICATE, a corporation, THE UNITED STATES NATIONAL BANK OF SAN DIEGO, a corporation, R. W. HASKINS, CHARLES KIBLER, THOMAS J. HAMPTON, F. M. KINNE, JOHN PALMER KEEP, J. W. DEERING, M. D. GOODBODY and WILLIAM O. SANFORD,

Appellees.

Reply Brief for Appellant.

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Reply Brief of Appellant

I.

RESPECTING THE BRIEF FOR APPELLEE BLOCHMAN.

The brief of appellee Blochman concludes with the assertion *"that the decree of the trial court should be affirmed."*

This, we submit, is literally all that is open to Blochman to ask in answer to the pending appeal, for the plain

reason that Blochman has taken no appeal and therefore has no standing to complain of the decree of the court below, which, after elaborate argument, overruled each contention made in this brief for Blochman.

This being so, it seems to be both immaterial and irrelevant to follow an argument over questions which are not involved in the appeal or assignments of error. Nevertheless, in view of the brief, it may be pardonable to advert, as briefly as may be, to the undisputed facts as to the time when, and the circumstances under which, the plaintiff acquired title to the 40 acres of land in question, which it is now claimed for Blochman it had no right to convey to the Union Title and Trust Company.

It appears from the record that, on June 9th, 1886, D. C. Reed, being the owner of the land described in the amended complaint conveyed it to one Chas. B. Kountze, who thus acquired the title to the same for himself and his brothers Augustus Kountze, Luther Kountze and Herman Kountze, as tenants in common in equal shares, and conveyance was made by said Charles B. Kountze to his said brothers accordingly. The title thus stood in the four brothers until Augustus Kountze died. The four brothers also held title to lands in various other states as tenants in common, in some of which their interests were equal, and in others unequal. After the death of the said brother and the consequent experience of the difficulties and complications attendant upon adjusting the interests by succession to their deceased co-owner, and of converting into money the properties so held, and, realizing that like complica-

tions would occur upon the death of others of the tenants in common, the persons interested in said lands decided to form a corporation, composed of the co-owners and to make conveyance to it of their several interests in all such lands in the several states, and to receive stock in the corporation corresponding in amount to their respective interests.

Accordingly members of the Kountze family organized under the laws of Nebraska, the complainant corporation with a capital stock of $2,500,000.00. All the surviving brothers and the successors in interest and also the administrator of the deceased brother, by deeds at various dates from May, 1893, to November, 1895, conveyed their interests in the lands so acquired in the several states, including the said land in California, to the corporation. (Tr., pp. 307-8, conveyances designated as E, F, G, and H.) All of these conveyances of the said tract in California having been made prior to February 7, 1896, on that date all such conveyances were recorded in the Recorder's office in the County of San Diego, State of California.

Complainant held the title to said land from the time it acquired it down to the date of the conveyance to the Union Title and Trust Company, and the execution of the so-called trust agreement set forth in the complaint, to-wit, September 15, 1912.

Complainant during all of said period paid the state, county and municipal taxes assessed against said property. It made no use of it nor derived any rents, income or revenue from it, nor in any way did any business with it further than to passively hold and protect its

ownership, in the course of which it prosecuted a suit to resist a street assessment; and in April, 1904, it made a voluntary conveyance as a gift to the City of San Diego, of a portion of said property for street purposes.

Under date of September 15, 1912, a sale of said land was consummated by complainant to L. A. Blochman, through one I. B. Porter, as broker, for the sum of $150,000. Porter received a commission as such broker which he shared with Blochman. At the request of Blochman the title was conveyed by complainant to the Union Title and Trust Company, a California corporation, and it executed the declaration of trust set forth in the complaint to which complainant and said Blochman became subscribing parties. At the time of the execution and delivery of said deed to the Union Title and Trust Company, and the contemporaneous execution and delivery of said trust agreement, Blochman paid $25,000 of the purchase price, leaving $125,000 to be paid as set forth in the trust agreement.

Other than as stated above, the complainant never owned any property or had any business transaction in California; nor opened any office in California, nor exercised or intended to exercise any other of its corporate powers in this State. (Tr., pp. 301-331.)

Upon these facts, unless it is desired by the Court, we shall indulge in no extended argument or citation of authorities beyond the bare statement of the statutes of the state in force when the plaintiff acquired this property and of the principles which, if the question were before the court, would forbid that the statute amending Section 410 of the Civil Code in 1911, should be

construed as having operated retroactively to destroy the right of the plaintiff corporation to sell and convey the 40 acres so acquired, to the end that it might withdraw from the state.

At the time when the corporation acquired said tract of land in California, the following provision in the Civil Code was and still remains in force, to-wit:

> "Sec. 671. Who May Own Property. Any person whether citizen or alien, may take, hold, and dispose of property, real or personal, within this State."

The only statutory provision special to foreign corporations in force at the time complainant acquired this land was that approved April 1, 1872 (Stat. 1871-2, p. 826), which was as follows:

> "Section 1. Every corporation heretofore created by the laws of any other state and doing business in this state, shall within one hundred and twenty days after the passage of this Act, and any corporation hereafter created and doing business in this state, within sixty days from the time of commencing to do business in this state, designate some person residing in the county in which the principal place of business of said corporation in this state is, upon whom process issued by authority of or under any law of this state may be served, and within the time aforesaid, shall file such designation in the office of the Secretary of State; and a copy of such designation, duly certified by said officer, shall be evidence of such appointment; and it shall be lawful to serve on such

person so designated any process issued as aforesaid. Such service shall be made on such person in such manner as shall be prescribed in case of service required to be made on foreign corporations, and such service shall be deemed to be a valid service thereof.

"Sec. 2. Every corporation created by the laws of any other state, which shall fail to comply with the provisions of the first section of this statute, shall be denied the benefit of the statutes of this state limiting the time for the commencement of actions.

"Sec. 3. Every corporation created by the laws of any other state, which shall comply with the provisions of the first section of this statute shall be entitled to the benefit of the statutes of this state limiting the time for the commencement of civil actions."

The concrete proposition to establish which the extensive brief for Blochman is devoted, comes to this: That, although the plaintiff had acquired the title to this 40-acre tract in accordance with the laws of California and in a perfectly lawful manner, at the time when it recorded its deeds in February, 1896, the Legislature of California, by the amendment of 1911, of Section 410 of the Civil Code, took away from it the power to convey this property to the Union Title and Trust Company on September 15, 1912, pursuant to the sale made to Blochman; and that such conveyance was *ab initio* and remains for that reason illegal and void. The position taken seems to be that the *jus disponendi*

as to this property rested in comity only, and that, therefore, the right and power to convey might be burdened, hampered, limited or entirely taken away at the pleasure of the state, upon some theory of power reserved by Section 1, Article XII, of the Constitution of the State to withdraw from said comity. (Brief, pp. 14-26-27.)

To this we beg to say, that if called upon by the court to do so, we are prepared to maintain upon principle and authority in answer to the several contentions for the defendant Blochman, based on Sections 405-406-408 and 410 of the Civil Code, the following propositions:

First. That the plea in abatement is not maintainable, either as an original proposition; nor since the filing of the articles of incorporation pending this suit, as alleged and proved by the documentary evidence on file.

Second. That the acts of complainant in holding and selling and conveying its tract of land was not "doing business" within the meaning of these statutes.

Third. That the statute, when properly construed, is not retroactive upon the title of complainant acquired prior to the act.

Fourth. That if construed to operate retroactively upon complainant's title to impose conditions upon its right to sell and convey, it would be unconstitutional and void.

(a) As impairing the obligation of the contract by which complainant acquired the property.

(b) As depriving complainant of its property without due process of law and denying to it the equal protection of the law.

(c) As enforcing filing fees which are in essence a tax upon the property of complainant without, as well as within, the state.

(d) And as imposing a penalty for holding property acquired before the statute and therefore *ex post facto.*

II.

RESPECTING THE BRIEF FOR THE TRUSTEE.

Trustee was under obligation to refrain from releasing any part of the security for plaintiff's purchase money because of the non-compliance by Blochman with his covenants in case he elected to sub-divide, to expend not less than $25,000.00 in preparing the 40-acre tract for sale.

The plaintiff insists upon the position argued in the opening brief for it (p. 56 *et seq.*) that the right of Blochman or his assignee to sell subdivisions of the tract and to releases thereof, when sold, from plaintiff's equitable mortgage, was subject to the condition precedent, among others, that $25,000 had been expended in improvements on the tract; and also, that the trustee was in duty bound to know that this condition precedent had been performed before it had any authority to do any act to impair plaintiff's security upon the whole tract for any part of the purchase money remaining unpaid.

Against this position it is contended that either the trustee was under no obligation to pay any attention to this condition, or, if it was under obligation to see that it had been performed, that plaintiff waived the condition by accepting the money paid by Blochman to apply

upon his overdue obligations for interest and principal of the purchase price.

The failure on the part of the trustee to advise plaintiff until long after it turned over to plaintiff the payments made June 30, 1913, and October 15, 1913, of the important fact that it had executed the map of La Binda Tract on January 27, 1913, and that the map was filed March 5, 1913, and that the trustee had attempted to release certain lots from plaintiff's equitable mortgage; and the fact that no hint of these things was given to plaintiff by the trustee prior to the receipt of the letter written to plaintiff's counsel December 24, 1913 (Tr., p. 538), in answer to a direct inquiry made (Tr., p. 535) is sought to be excused in the brief for the trustee (Tr., p. 8-13) by the contention that plaintiff ought to have inferred these things by a course of ratiocination from premises found in the contents of a letter from Blochman written April 4, 1913 (Tr., p. 458).

In this letter Blochman seeks to excuse his delay in paying interest by saying he had sold to one Hampton; that it took Hampton about two months to have *his* map accepted by the City Council; that the cost of improving the property would probably be something like $75,000 and that the best part of the season had gone by before Hampton was in position to make any sales, and that he had sold up to date only two lots in the tract. (This, by the way, was the first and last reference to a sale of two lots, and like all the other activities of Hampton, this transaction came to naught.)

We submit that this letter was very far from giving notice that Blochman as the beneficiary, who alone was

authorized or empowered by the contract to do so, had presented to the trustee for signature, a map or plat subdividing the land; or that the trustee had signed or acknowledged such a map, or that $25,000 had not been expended in improving the property; or that the trustee would do any act with intent to "release" any lots from the lien to secure plaintiff's purchase money.

Indeed, so far as this letter is concerned, Blochman's intimation is that he had made provision through Hampton for improvements already made and secured to be made and to cost approximately $75,000, for the letter contains the following statement:

> "Finally the City held him up and compelled him to put up a bond to pay for all sewer and water pipes on the tract, and the Gas & Electric and Telephone Companies compelled him to pay for all the wires and pipe so that the cost of improving this property will probably be something like $75,000."

This letter was calculated to induce plaintiff to believe that a bond had been given satisfactory to the City of San Diego for payment of all sewer and water pipes on the tract; and that the gas, electric and telephone companies had compelled him to pay for all wires and pipes, *so that* the cost of improving the property would amount to $75,000.

This, we submit, was virtually a statement on the part of Blochman that he had procured compliance with his covenant to expend at least $25,000 in preparation of the property for sale, but confessedly, this whole Hampton episode proved to be wholly illusory.

As to Hampton and his map referred to in Blochman's

letter of April 4, 1913, plaintiff heard nothing more until April 30, 1913, when the trustee sent to plaintiff the telegram (Ex. 25, Tr., p. 476), "Hampton *entirely* eliminated". The natural inference was that all his works including his map went with him; unquestionably all his sales went with him, for not one of them survived. Certain it is, and that is the vital thing, that the trustee gave no hint that it had executed that or any other map, or that any such map had been filed, or that the subdivision had been actually effected, until in an inquiry transmitted by Mr. Congdon, as counsel for plaintiff in his letter of December 19, 1913 (Ex. 79), there was vouchsafed the scant information contained in the trustee's letter of December 24, 1913 (Ex. 81); but this was long after the trustee had dealt on Blochman's and his Syndicate's orders with all the 30 lots; of all of which plaintiff had not had the slightest suspicion. Neither Blochman himself, nor anyone for him, did anything toward compliance with this covenant to expend not less than $25,000 in preparation of the tract for sale.

On April 30, 1912, the trustee wired the following (Ex. 25, Tr., p. 476) in which it took the responsibility of assuring plaintiff that,

> "Company now being formed by responsible people to take over Kountz Tract. We strongly advise twenty days extension of payment. Hampton entirely eliminated, new company strong and active."

Here we note the express statement in the brief, page 14, to-wit:

> "And the record does not connect in any wise the trustee's telegram about 'Company now being formed' with the La Binda Park Syndicate which had already been formed and had acquired Blochman's interest."

But the record shows that the letter from Blochman to the trustee, dated on the same date as this telegram, to-wit: April 30, 1913 (Ex. 26), advised the trustee of the transfer made on April 28, to the La Binda Park Syndicate, setting forth the names of the officers.

What company other than the La Binda Park Syndicate was referred to in this telegram in connection with the advice for the twenty days' extension, the trustee does not suggest.

To say the least, it is a reflection upon the soundness of the advice to give a twenty day extension, to now suggest that it was given upon the strength of the formation of some unknown company, the secret and myth concerning which is, and as we suspect will forever remain, with this trustee. But this much is true, that an extension was obtained from and given by plaintiff, ending the 27th day of June, 1913 (Ex. No. 47), and this gave time for the manipulations evidenced by the "Alpha", "Beta", "Delta" and "Gamma" transactions.

The trustee was an express party to the covenant by which Blochman agreed to expend at least $25,000 in preparation of the subdivision for sale, and being so, owed to plaintiff the duty of keeping plaintiff's security intact so long as that covenant was unperformed.

We desire to avoid repeating the discussion made at length in the Opening Brief, pages 49-73, of the general proposition that the defaults by Blochman in performance of his covenants to make improvements, to pay interest and principal, at all events strictly at the times fixed, and to pay the City, State and County taxes, which became liens respectively in January and March, 1913 (Tr., p. 442), disentitled Blochman to enforce the provision as to partial releases.

But, in view of the position taken as illustrated by the assertion (pages 42-43 of the brief for trustee), where it is said:

> "The trustee had nothing to do with the expenditure of any part of the $25,000," etc,

we recur here to a special feature connected with the default in making the improvements which Blochman covenanted to make on electing to subdivide, which was not specifically discussed in our opening brief. We, therefore, supplement the former discussion of this particular feature as a challenge to the contention illustrated by the following statement, page 7 of the brief, to-wit:

> "There was no duty imposed on the trustee to see that Blochman's covenants, or any of them, were kept."

(And see the similar statement at the bottom of page 18 of the brief).

The clause in the trust agreement which embodies the covenant of Blochman relating to the expenditure of at least $25,000 in preparation of the tract for sale is as follows:

"It is understood and agreed by the trustee, beneficiary and the payee herein mentioned, that the said real property may be subdivided into smaller tracts, lots, blocks or subdivisions, and that the signature of the trustee herein to the proprietor's acknowledgement of the map or plat of said subdivision shall bind all the parties hereto; and the said trustee is hereby authorized and directed to sign and acknowledge as proprietor such map or plat subdividing said land as shall be presented to it for signature by the beneficiary hereunder; and it being understood and agreed that said land when subdivided as aforesaid shall have and contain in addition to the streets, alleys and public grounds, at least two hundred and fifty lots, none of which shall have a street frontage of more than fifty-five feet, except corner lots which may have a frontage of not more than one hundred feet; and it being further understood and agreed that said beneficiary will expend in the subdivision, laying out, platting and preparation for sale of said real property at least the sum of twenty-five thousand dollars ($25,000) or more before the first day of March, 1913."

We submit that this paragraph makes the trustee as well, and as explicitly, as the plaintiff itself, a covenantee of Blochman as the obligor in his covenant as to this expenditure to be made for the improvement of the tract in preparation for sale. The first clause of this paragraph reads:

"It is understood and agreed by the *trustee,* beneficiary and payee herein mentioned" etc.

The last clause of the paragraph reads:

"And it being *further* understood and agreed that said beneficiary will expend in the subdivision, laying out, platting and preparation for sale of said real property at least the sum of twenty-five thousand dollars ($25,000) or more before the first day of March, 1913."

Who are the parties to this further understanding and agreement? They must be and are the three parties named in the introductory clause of the paragraph; and the *trustee* stands at the head of the three named parties to the agreement.

And why should the trustee not be made a party to the agreement requiring these improvements to be made before the integrity of plaintiff's security should be broken into by the sales of subdivisions as contemplated? The plaintiff's interest in this covenant was as a part of a *quid pro quo* for the militation against the entirety of its security for the unpaid purchase money which was involved in its consent to the subdivision of the tract, and to the sale in parcels. In other words, this covenant was in the interest of plaintiff's security. But that security itself was entrusted to the trustee for the non-resident payee. Was it not logical, proper and reasonable thus also to commit to the trustee the incidents and safeguards to that security which were embodied in this covenant to make improvements contingent upon election to make and the making of the subdivision?

Why should the incident of the security not go into the same trust with the principal of the security? There is every propriety that the contract should so provide; and that it does so provide, we submit, is the express provision of the trust agreement.

But, if the trustee was, in the interest of the payee, made a covenantee in this agreement of Blochman to make improvements, then what right and power had the trustee to enforce this covenant? Here we touch the nerve of the trustee's contention made at page 7 of its brief, and restated in the second conclusion stated at page 104, and the fifth submission on page 106.

It is said on page 7, respecting the obligation of the trustee:

> "Responsibility is present only where duty exists, and between responsibility and duty there must be an equal balance. There was no duty imposed on the trustee to see that Blochman's covenants, or any of them, were kept. Furthermore, its powers were either dormant or passive, not active."

To this we reply, that if the trustee, holding the legal title for plaintiff's security was a covenantee in behalf of plaintiff in this obligation of Blochman, then it had the security for enforcing this covenant in its hands. It could remain *"passive"* and refuse to deed out a single parcel so long as that covenant remained unperformed. The power that was *"dormant"* was the power to convey and thus release, or impair to the extent of the conveyance, the payee's security, so long as Blochman failed to perform this condition precedent to his right to break in upon the integrity of plaintiff's security.

The trustee's duty to convey a single parcel would only become *"active"* after compliance with this condition precedent as well as after the strict compliance made with the other covenants of Blochman.

We submit that where, as here, a contract right is given to the trustee respecting the security for the payee, a *"duty"* arises to see that the benefit of that covenant is not frittered away. But that duty is what is flatly repudiated by the brief for the trustee. And that duty was disregarded by the trustee in its attempt to convey, or to undertake any new trust as to any of the 30 lots in question, adverse to the trust which it had undertaken for plaintiff. As was said in *Ainsa* vs. *The Mercantile Trust Co.*, 53 Cal. Dec. at page 300:

> "Appellant cites authorities to the effect that a trustee owed a duty to the bondholder of preservation and protection of the security. This is undoubtedly true if the means of defense are known to the trustee or may with diligence be discovered. (*Cuthbert* vs. *Chauvet*, 136 N. Y. 326-332.)"

What does the trustee mean by the term "release" as applied to the transactions in evidence?

The trustee at no time made any conveyance of any of these 30 lots except as to the five lots B, D, F, H, and J, in Block 5, on March 21, 1914, to Haskins. This deed was made pursuant to the order given by Blochman under date June 28, 1913 (Ex. 102, p. 570), and after the explicit request by plaintiff that the trustee should not divest itself of the legal title (Tr., p. 363).

The conveyance made to the Union Trust Company by the Union Title & Trust Company of Lot "I" in Block 5 was a mere shifting of the trust from the original trustee to a segment of itself created by the fissure in the original corporation resulting in the two corporations, Union Title Company and Union Trust Company; and such conveyance constitutes no real parting with the title by the trustee.

As to all of the 30 lots other than the five deeded to the defendant Haskins, the legal title stands precisely where the conveyance from plaintiff to the Union Title & Trust Company, now the Union Title Company, put it; and where, as so vested, it was charged with the trust to secure payment of the plaintiff's purchase money.

Therefore, when the brief for the trustee speaks freely of "release" of these lots from the trust which constituted an equitable mortgage for plaintiff, we are to inquire in what these alleged "releases" consist.

Upon examination of the record in this behalf, it appears that the so-called "releases" involved no change in the legal and record title to 24 of these 30 lots, and that as to one of the remaining six of them there was a mere shifting by the trustee to a subdivision of itself. As to all but the Haskins lots, the legal title stands just where plaintiff's deed of September 15th, 1912, to the Union Title and Trust Company vested it, and upon which it issued its declaration of trust by which plaintiff's equitable mortgage was declared.

These so-called "releases" then, so far as the said 25 lots are concerned, consisted simply and solely of orders from Blochman upon the trustee holding the title for

plaintiff's security, requesting such trustee either to make deeds or issue new declarations of trust for the lots specified in the order, in favor of the persons named in the order; of the acceptance of these orders by the trustee; and of its acting upon them in all cases except that of Haskins as to five lots, not by executing any conveyance but by executing a new declaration of trust to the persons named in the order, or to their endorsees of the order. These new declarations of trust and subdeclarations of like character, multiplied into intricate and bewildering complexities and were kept profoundly secret, not only from the public but from this plaintiff, until it dragged out of the trustee by direct demand the bare admission contained in its letter of September 24, 1913, that "a number of lots have been released." (Ex., 78-81.)

This, as we have sufficiently pointed out, was the first intimation given by the trustee of its dealings with these lots; but as to any details of such releases in respect of how, and how many, or in whose favor, the trustee gave no information then and peremptorily refused subsequently, on March 16, 1914, to make any disclosure. (Tr., pp. 362-3; 423-425.)

The next information received by plaintiff concerning the manipulations of these lots was when Porter for the first time revealed something in detail of the transactions to Mr. Grimmel, the secretary of plaintiff, at his interview January 4, 1914, at the office of the plaintiff at Omaha, much to the surprise of Mr. Grimmel, who had conducted all of the correspondence with the trustee and Blochman. We invite attention to this

testimony. (Tr., pp. 353-357.) See also on the same subject, Porter's interview with Mr. Congdon on January 15, 1914, in his office at Omaha, of which Mr. Congdon says (Tr., p. 364), "In our conversation he informed me that some 30 lots had been released, but what he meant by 'released' I did not fully comprehend."

Thus it appears that plaintiff all unwittingly to it had been committed by the trustee, to a series of complexities relating to its security for its purchase money, but with whom and how, was kept in deep secrecy by the trustee.

The point is now made in the argument that though the plaintiff was actually prevented by the trustee from learning who were the *cestuis que trust* created by these hidden trusts until the compulsions of the trial revealed them, that there is defect here of necessary parties defendant, because certain of the beneficiaries of these secret trusts are not made defendants.

To this we reply later. But we are immediately concerned with the inquiry as to how these new and adverse secret trusts could operate to "release" any lots from plaintiff's equitable mortgage, seeing that the legal title remained unchanged, and in view of the further fact that there is not a single writing in evidence which purports in terms to make a release of a single lot from the declaration of trust to which the trustee, the plaintiff and Blochman were parties except as implied in the deed to Haskins. All that was done with that exception was to mount new declarations and sub-declarations of trust upon this original trust for plaintiff. These "releases" are then mere mental operations on the part of

the trustee, and secret at that; all that was done as to 25 of these lots was to declare new and conflicting trusts. The profound conflict of this system of holding properties in such secret and shifting trusts, with the policy of recording laws, of this state, is apparent. Naturally, as is well known, there is a deadly hostility on the part of corporations in this business to publicity and especially to the Torrens Act which compels publicity.

It will be noted that on page 39 of the brief it is stated that Blochman

> "desiring to avail himself of the benefits to be derived from the *privacy of a Declaration of Trust* arranged with plaintiff for a conveyance direct to the trustee and the creation of such a deed of trust by the agreement securing the unpaid purchase price to plaintiff."

It may be imagined that the plaintiff now understands the complications into which its concession to Blochman in this matter has involved it.

Moreover, the releases contemplated by the contract are only such as are consequent upon *deeds* rightfully made by the trustee.

There is nothing in the agreement which authorized the trustee to give mortgages or liens on, or hypothecations of the lots in any form, at the instance of Blochman, or La Binda Park Syndicate, which should be or could be superior to plaintiff's prior lien for the purchase money.

We submit that inasmuch as the legal title to these 25 lots remains standing of record in the trustee, just as

originally conveyed to it for plaintiff's security, there has been no release of them, even in form as well as not in right or substance, from plaintiff's equitable mortgage.

Whatever effect these Declarations of Trust made on the orders of Blochman or La Binda Park Syndicate, may have on the purchaser's equitable estate, they, by the very form, as well as by the substance of the transactions, bind nothing but the equitable interest of Blochman, or his Syndicate, and are ineffective to overreach the plaintiff's lien and prior equity.

THE KIBLER AND HASKINS TRANSACTIONS.

In view of the arguments in support of the Kibler and Haskins transactions, submitted in the briefs for appellants, we further submit the following upon that subject:

These transactions of Blochman and his Syndicate with the Kiblers and with Haskins are entirely similar in their origin, and differ only in their later history in that the trustee made a conveyance to Haskins of the five lots covered by the Blochman order to him on March 21, 1914, and after request by plaintiff and the trustee to make no conveyances; whereas, as respects the eight lots covered by the two Kibler orders, no conveyance has been made by the trustee, but only Declarations of Trust by it on the orders of the Kiblers to the institution and persons from whom they borrowed $5000.00 which they paid to Blochman or his Syndicate, and which was paid over to the trustee to apply on plaintiff's debt.

It will be noted that Charles Kibler and Louise R. Kibler are husband and wife, and that their transaction in borrowing the money which they paid to Blochman for the 50 shares of preferred stock is conclusively shown by the evidence to have been a community transaction, and that the title to said stock, as well as any interest they acquired in the eight lots became community property of Kibler and wife, and therefore that such community rights are fully represented in this litigation by the husband.

This much, we submit, is clearly true, concerning both the Kibler and Haskins transactions with Blochman and La Binda Park Syndicate; that Kibler and Haskins each bargained with the Syndicate to buy 50 shares of the preferred stock of the Syndicate at the par value of each block of $5000.00, which was the price at which the resolution of the Syndicate board required the sales to be made (Tr., p. 382); that the certificates to each for 50 shares were issued to them June 26, 1913 (Tr., p. 380); that on June 28, 1913, Blochman signed the orders, bearing that date, on the trustee to deed the eight lots to the Kiblers and the five lots to Haskins; and that Blochman on the 28th day of June, 1913, paid the $5000.00 which he had received from the Kiblers and the $5000.00 which he had received from Haskins in these stock transactions, to the trustee. (Ex. 92, Tr., p. 554; Ex. 103, Tr., p. 571; Ex. 102, Tr., p. 570.) It is also true that at that time the La Binda Park Syndicate had assumed and agreed with Blochman to pay to plaintiff the purchase money debt. (Tr., p. 446.)

It is claimed (brief for trustee, pages 34-35) that

there is no evidence that the trustee had any notice of these stock transactions when it accepted these three orders; but this overlooks the fact that, according to the testimony of Mr. Taggart, the trust officer, there was a discussion participated in by Kibler, representing himself and Haskins, Blochman, Porter and Taggart, on the 28th day of June, 1913, at the trustee's office, which occupied several hours. (Tr., p. 375-6.)

That in the course of that conference these orders were written by Taggart; that, in accordance with what was then told him by those other parties, in drawing the Haskins order he made an endorsement on it as shown (Tr., p. 570), to-wit:

> "The within property to be held in trust for one year after date to secure."

followed by the words with a line drawn through them:

> "La Binda Park Syndicate for the payment of 50 shares of preferred stock."

This endorsement was evidently incomplete. Mr. Taggart explains as follows (Tr., p. 378):

> "The order, exhibit 102, was first accepted, then the notation was endorsed upon the back of it and we discussed the matter and I found that it was really a matter foreign to our duties, which I did not want to attend to, and I said to Mr. Kibler that I would rather that the La Binda Park Syndicate and Mr. Haskins handle that matter between themselves. Mr. Blochman represented the La Binda Syndicate, and Mr. Kibler represented Mr. Haskins, Mr. Porter was there, and they agreed to attend to the matter between themselves, and I made

the erasure in the endorsement in my own handwriting, I started to write it at the dictation of either Mr. Blochman or Mr. Kibler; I cannot say who dictated it because they explained the circumstances to me, and I might have written this on here at my own instigation and then afterwards discussed it further and decided that I did not care to mix up further on it. It entailed more work than I cared to attend to. It was finally understood that this endorsement was to be of no effect, and was scratched out."

We submit that the evidence does show that the trustee was advised of these stock transactions. The other testimony upon the subject of the Kibler and Haskins deals with Blochman and his Syndicate is found in the transcript as follows: that of Porter at pages 381-404 and pages 437-8; Haskins, page 406, and Kibler, page 434.

The question recurs: What right did the Kiblers and Haskins acquire by these stock and lot transactions to displace plaintiff's lien upon the 13 lots, and what power had the trustee, who knew the facts, to deed to Haskins, or to declare a trust adverse to plaintiff's security upon orders given by the Kiblers?

Since the purchase of this preferred stock by Kibler and Haskins never was rescinded, and since they remain standing as registered owners each of 50 shares of this stock which there was no authority to sell at less than par, we submit that at least as between them and the plaintiff, a creditor of the Syndicate for the debt secured on these lots, the payment of $5000.00 each to the

Syndicate which it applied on the overdue portion of the debt, must be referred to the stock purchase and in no wise to the discharge of the lots from plaintiff's prior lien.

The equity of plaintiff as a creditor of the Syndicate and as the holder of the prior purchase money lien is, as to these lots, superior to any imaginable equity of the stockholders of the corporation, who have paid up the price of their stock; and its lien is superior both in time and in right.

To the contention made in the brief for Haskins, as well as in other briefs, that the trustee was the agent of plaintiff and that Haskins was a third party dealing at arm's length with the trustee, and that the trustee by its acts in reference to the trust property bound the appellant (Brief, p. 10) we undertake to reply under the next heading in this brief.

III.

REPLY TO ARGUMENT THAT PLAINTIFF IS ESTOPPED TO OBJECT TO DISPLACEMENT OF ITS LIEN BECAUSE IT HAS NOT REFUNDED THE PAYMENTS MADE BY BLOCHMAN OR HIS SYNDICATE UPON THE PURCHASE MONEY DEBT OWED TO PLAINTIFF.

In each of the three briefs, and most surprisingly in the brief for the trustee itself, occurs the argument that if plaintiff does not wish to submit to the supposed "release" of these 30 lots from its prior lien for its purchase money it is under some equity to refund the pay-

ments made by Blochman and his Syndicate *on the purchase money debt.*

This argument proceeds upon the basis that granting that the trustee exceeded its authority in its attempt to supersede plaintiff's security on these 30 lots, it is estopped from rescinding the unauthorized "release" unless it first refunds the payments made by Blochman or his Syndicate with money which they obtained upon the orders given by them upon the trustee to United States National Bank, to Haskins, and to the Kiblers (Exs. 90, Tr., p. 548; 92, Tr., p. 553; 103, Tr., p. 571) which were acted upon by the trustee and upon the Declaration of Trust made by the trustee, in favor of Steckatee (Tr., 575). To whom it is imagined that such restoration should be made, is not suggested.

But, if the trustee exceeded its authority in its attempts to displace plaintiff's lien, then all concerned in this transaction are charged with notice of that fact; for it is undisputable that all persons who dealt with Blochman or his Syndicate respecting their equities in these lots, and especially since the legal title securing the plaintiff's equitable mortgage remained in the trustee in its original form, are conclusively bound by the same limitations as Blochman himself. And since the trustee was bound by the same limitations as Blochman, it could no more confer rights in conflict with its trust for plaintiff than Blochman or his Syndicate themselves could. So far as the receipt of this money by plaintiff was concerned, it received it as payment upon its debt from money owned by Blochman and his Syndicate; the debt upon which it was applied was overdue and un-

disputed, and plaintiff had no knowledge of how or from whom Blochman or his Syndicate had acquired this money; and plaintiff had no responsibility in that behalf.

There is not to be indulged the preposterous assumption that it was the trustee, as plaintiff's agent, that borrowed the money from the United States National Bank and from Steckatee; or, that it was the trustee who sold the preferred stock in the La Binda Park Syndicate to Haskins and the Kiblers, or who bargained to throw in the 5 and the 8 lots to them respectively by way of good measure. These were all transactions with the claimants, the other contracting parties to which were Blochman and his Syndicate, and not the trustee.

The title to the money raised by Blochman and the Syndicate was in the debtor of plaintiff when it was paid on the debt; it was received as such debtor's money and irrevocably applied as such; and the contract gave the plaintiff the unqualified right to these payments, to which as provided in the contract (Tr., p. 40) it was entitled at all events.

As already stated this rescission and refunding argument proceeds upon the premise that the trustee exceeded its powers in the attempt, or efforts with intent, to displace plaintiff's prior liens. In other words the argument implies the admission of a violation by the trustee of its trust for plaintiff. It is a surprising premise for the trustee to adopt as a basis of its estoppel argument. For, if the premise is true, the trustee is liable to its co-defendants for doing what it had no right to engage to do for them,—unless the trustee can protect itself on the ground

that these co-defendants were as much chargeable with knowledge that the trustee exceeded his power as the trustee itself.

In fact, the argument must all return to the primary question in this case, which is, whether the trustee did exceed its powers in the attempt to displace plaintiff's lien upon these lots. If so, then all persons with whom Blochman and his Syndicate dealt are conclusively charged with notice of that fact. To the extent that the trustee did exceed its authority it was *not* plaintiff's agent. Neither is plaintiff responsible to any one for the trustee's conduct in exceeding its power; nor is plaintiff under any obligation to refund money which it rightfully received from its debtor and applied to its valid claim for purchase money.

If, on the contrary, it shall be found that the trustee was authorized by the Declaration of Trust to deal with these lots as it did deal with them at the request of Blochman and his Syndicate, then likewise there is nothing to rescind or refund, and no estoppel is involved; and the only question would be, what was the legal effect of that which was actually done as affecting plaintiff's prior lien?

But, the trustee becomes a sort of a *felo de se* in submitting an argument invoking the principles of estoppel which proceeds upon the premise that it itself violated its trust for plaintiff.

In view of the suggestions made in these several briefs, as illustrated in that for Haskins, to the general effect that the trustee, by its acts in reference to the trust property, bound the appellant by these attempted

"releases", we repeat that the very language of these orders from Blochman upon the trustee was notice to the recipients that the Union Title & Trust Company held the legal title as trustee, and that Blochman and his Syndicate had only equitable interests; and moreover, these orders disclosed on their face that a relation existed between Blochman and the plaintiff which called for payments of the money raised by Blochman and his Syndicate to plaintiff.

The rule that one knowing that the title to real property is vested upon a trust is thereby put upon inquiry as to the limitations and restrictions upon the power of disposition by the trustee, has nowhere been more explicitly held than by this court, *vide*: *Geyser Marion Gold Mining Co.* vs. *Stark*, 106 Fed., 558; followed in *Stemfels* vs. *Watson*, 139 Fed., 505. Hence, we submit that the whole contention that these persons dealing with Blochman or his Syndicate with regard to their equities, under a title held by the Union Title & Trust Company, as trustee, dealt with the trustee as the agent of the plaintiff without regard to the conditions, limitations or restrictions of the trust, is in direct conflict with the equitable rule stated in those cases as follows:

> "The fact that he holds it as trustee is a warning and declaration to the world that he is without the power of disposition, unless that power is specifically given by the instrument creating the trust, or by the assent of those whom he represents."

The assent of Blochman or the Syndicate could bind their interest; but it required the assent of plaintiff before the trustee could bind its interest in any attempt

to displace the plaintiff's lien. It is very certain that the plaintiff gave no such assent after the making of this Declaration of Trust.

So the question comes back to the primary inquiry as to whether the plaintiff gave in advance, by the trust agreement itself, its assent that the trustee might, upon the mere payment of overdue installments of the purchase price, and while the purchaser remained in default on his covenants to improve and to pay taxes, release plaintiff's equitable mortgage upon these 30 lots for the unpaid purchase money.

This is, however, not conceding that what was actually done by the trustee, in the premises, amounted even in form and legal purport, to discharges or "releases" of plaintiff's subsisting and paramount lien of these lots.

Consideration of Points made in the Trustee's Brief, under heading "Releases Not Limited to Sales."

In order to avoid misapprehension, we re-state the position which we have attempted to maintain respecting the matters discussed by counsel under this heading, thus:

We submit that the trust agreement contains no authority to the trustee to execute deeds for subdivisions, except in case of sales by the beneficiary, *i. e.*, Blochman or his assignee.

We say that the contract gave no authority to the trustee to create liens or hypothecations on any subdivision of the tract, by Declarations of Trust, or otherwise, at the instance of Blochman or the Syndicate

which should displace plaintiff's equitable mortgage pro tanto; and that the only partial releases which were provided for or contemplated by the contract were through deeds to be executed by the trustee pursuant to sales made to purchasers of such subdivisions.

There is no provision for deeds to Blochman himself of any subdivision, nor does the assignee of his whole interest, the Syndicate, have any greater right than he.

The same paragraph of the contract which contains the provision relating to sales of subdivisions and directing the execution of deeds in that case, contains the provision which defines when Blochman or his assigns shall be entitled to conveyance. And its language is as follows:

> "And after every and all claim or demand of said payee, and the said expenses hereinbefore mentioned, have been fully paid and liquidated by said beneficiary, then in that event said trustee is authorized, upon demand of said beneficiary, to convey all remaining property in its hands to said beneficiary, or his assigns."

We perceive no limitation upon Blochman's right to negotiate sales of the whole or any part of his interest in this tract. Indeed, he disposed of his whole interest to his Syndicate corporation. We have not questioned that. But, when it comes to the execution of deeds by the trustee, it is *then* that the question arises whether the necessary conditions precedent to the exercise of the trustee's power and authority to deed have been complied with. In fact, this strict question is presented

by the record in the case only of the deed made to Haskins.

But as to everything else done by the trustee, that is, as to all it has essayed to do, with the other 25 lots, all was and is entirely without the letter, as well as the spirit of any authority given to the trustee in the trust agreement.

We shall search this agreement from end to end in vain for any authority to this trustee to declare new and adverse trusts in favor of parties contracting with Blochman or the Syndicate to loan them money, or to induce them to become purchasers of the corporation stock, which trusts should displace plaintiff's security.

With this preliminary comment, we submit some examination of the argument submitted under the above head for the trustee.

Counsel say (p. 51) concerning the paragraph relating to the sale of subdivisions and the execution of deeds by the trustee:

> "This provision in no way requires that the sale be made at any time, but on the contrary *it absolutely prohibits the beneficiary from consummating any sale while the lot or lots intended to be sold remain subject to plaintiff's lien or right.*"

And on page 52 it is said:

> "The plaintiff consented to the release provisions, but never consented that there *should be a sale out of the trust itself,* hence the peculiar language 'that when so subdivided the said real property may be sold by the beneficiary hereunder, or his assigns.'"

If, by the latter clause, there is meant what it says, to-wit: that the trustee had no power to sell, we can certainly agree; but if, by the former clause, there is meant what it seems to say, then we despair of reconciling the argument for the trustee with its practice and conduct which has brought about this suit.

For how does this argument comport with the practice of the trustee under review? Did it in the transaction of June 28, 1913, or October 15, 1913, refuse to accept orders for disposition of lots "while the lot or lots intended to be sold remain subject to plaintiff's lien or right"? It did just the contrary.

If we are permitted to speculate, we suppose the point which is sought to be made is that payments by Blochman or the Syndicate to apply on defaulted installments of interest or principal, or both, *ipso facto* effected a release from plaintiff's equitable mortgage of one inside lot for every $1000.00 applied on such overdue payments; and that thereafter the beneficiary could select this number of lots in any portion of the tract and require the trustee to deed them to the beneficiary or anyone else as the beneficiary should direct. And this argument is made the justification of new Declarations of Trust made by the trustee, on the theory that as to that number of lots it was discharged from any responsibility to plaintiff and was trustee only for the beneficiary.

Pursuing this argument, it is contended on page 65 and thereafter, that the payment of interest released inside lots at the rate of one for each $1000.00; but it seems to be conceded, at page 66, that the clause providing that whenever $1000.00 shall be paid on the debt

the interest on the amount paid shall cease, means that "interest would only cease on the $1000.00 paid when it was paid on the principal."

We submit that the whole contention under this head, from pages 50 to 69, apparently directed to establish the position taken for the trustee that it was empowered by the agreement to execute deeds without respect to any sales and without regard to any defaults in the contract, to one lot for each $1000.00 paid as the whole or any part of overdue indebtedness, is absolutely unjustified by anything contained in the agreement.

Stephens vs. *Keene*, 67 So., 226, cited at page 55 of opening brief; and see

McComber vs. *Mills*, 80 Cal., 111.

The acceptance of the payments of June 30, 1913, and October 15, 1913, made of money overdue under the contract, and the retention of the same, was in accordance with the plaintiff's contractual rights, and its acceptance created no waiver, except at most of the previous declaration making the whole unpaid purchase money due.

In further considering this contention, that because plaintiff accepted the payments from Blochman or his Syndicate of the purchase money overdue, it waived all objections to the mutilation of its security, we submit: That the only waiver to which the plaintiff assented in accepting these overdue payments was of its notices declaring the whole purchase money due for failure to make these payments on time. The last notice waived was that of June 17, 1913. (Ex. 47, Tr., 495.)

The trust officer of the trustee testified that he did not give to plaintiff any further information as to the source of the money paid on June 30, 1913, than contained in the letter of the same date (Ex. 50, Tr., 502); nor of the source of the money paid to plaintiff other than that contained in the letter dated October 16, 1913, (Ex. 64, Tr., 516). These letters are bare letters of remittance. The trust officer's reason for not disclosing the source of this money as stated by him in his testimony is that:

"I did not think it necessary." (Tr., p. 373.)

Not only did the trustee not think it necessary to say anything to plaintiff at the time of these remittances or afterwards before the trial, of the source from which the debtors derived the money with which they made these payments, but the letter of November 5, 1913, from the trustee to plaintiff is notable, both by what it conceals and what it suggests. This letter (Ex. 70, Tr., 526) contains the following:

> "No doubt you have been closely in touch with conditions on the coast, and know that there has been very little activity in subdivision property, especially in the class of property which must be highly restricted, *thus calling for extensive improvements before placing it on the market.* When the Syndicate was formed they expected through the sale of its securities to raise sufficient money to further the *improvement now under way. They raised, however, sufficient amount to make the payment which was due you May 1st, and they were forced to stop improvements on the tract.*

This letter, so far from revealing the attempted disposition of the 30 lots, or any of them, carries unmistakably the impression that the money for the payment made June 30, 1913, had been obtained from the sale of *securities* of the Syndicate. So far as appears it had no securities except its preferred and common stock. Fifty shares of this preferred stock were sold to Haskins and 50 shares to the Kiblers. Under the resolution of the Board of Directors of the Syndicate, this stock was authorized to be sold only at par.

The letter is a plain *suppresio veri* of the fact that the 30 or any lots had been used with the trustee's aid to raise the money, and a positive *suggestio falsi,* in that it conveys the clear intimation that the money was raised by sale of *securities* of the Syndicate. In this letter it will also be noted that there is a reference to *"the improvements now under way".*

And so it was that complainant in the effort to learn the true status of the tract, made through its attorney, the explicit inquiry in his letter of December 19, 1913, as follows:

> "Have the lands been subdivided into lots as provided in the contract they may be, and have any of the lots been sold on contract or otherwise?"

In answer to this, by the letter of the trustee to the attorney for complainant, dated December 24, 1913, was conveyed the first intimation of what the trustee had done, in the following language:

> "Replying to your second question, we beg to state that the land has been subdivided into lots in a subdivision known as La Binda Park, and pur-

> suant to the provisions of the declaration of trust, *a number of lots have been released* upon payment of the amount designated in the declaration, which amounts have been duly forwarded to your credit."

Upon receipt of this letter, Mr. Congdon, as attorney for complainant wrote to the trustee under date of January 5, 1914, a letter which contains the following:

> "Was very much surprised to learn from Mr. Porter that you had released or deeded certain lots upon payment of the first installment of $25,000 named in the contract and interest. Certainly the contract does not provide for such procedure. The contract with reference to deeding lots provided that when lots are *sold* you are authorized to convey upon receiving on account of an inside lot sold $1000 and on account of a corner lot sold $1200."

We have referred again thus at length to the correspondence, to demonstrate that in accepting the payments of the defaulted principal and interest remitted June 30, 1913, and the defaulted interest remitted October 16, 1913, the complainant was without any knowledge or notice that the trustee had been a party to an attempted "release" of any lots, from being security for the indebtedness remaining unpaid after the application of those payments on the obligation overdue; and therefore, that there can be no pretence that complainant by acceptance of those payments, *waived any conditions or terms of the contract which restricted the power of the trustee to make any such release of security.*

Under all the facts, so far as known by or communicated to complainant by the trustee, or anyone else, the

complainant was justified in believing that Blochman paid the amount remitted June 30, 1913, as a simple payment under his contract; and that the payment of interest remitted October 16, 1913, was a simple payment upon the obligation of Blochman's contract by him and his associates, disconnected from any participation by the trustee by way of an attempted release of lots. What other inference could complainant draw from the letter of May 9th, 1913, referring to a tender of the money in gold, without hint of any condition or qualifying terms; and what from the letter of November 5, 1913, calculated to create the impression that the moneys had been raised by a sale by Blochman's Syndicate, of its *securities?*

We submit, that the acceptance of these payments were rightfully attributed by complainant to the simple *pro tanto* performance by Blochman or his Syndicate of the overdue obligations of his contract; and that neither the acceptance of these payments, nor the retention of them, constitutes any waiver of the conditions of the trust agreement which governed and limited the right and authority of the trustee to consent to a release of the thirty lots from being security for the purchase money now remaining unpaid.

We do not question that by the suppressions of the truth and the suggestion of what was not true as above pointed out, the trustee obtained the consent of the complainant to waive its declarations in the notice served June 17, 1913, declaring the whole amount due. This waiver was, however, obtained illegitimately, and even as so obtained extended no further than to give Bloch-

man time to make the subsequent payments according to the contract. But upon the new default November 1, 1913, the complainant, still without knowledge of the trustee's acts relating to its attempt to withdraw these 30 lots from plaintiff's security, gave renewed notice of election to declare the whole $100,000.00 remaining unpaid, for non-payment of the installment of $25,000.00 and interest due November 1, 1913, which notice was dated November 3, 1913, and served November 8, 1913.

But all this has no tendency to show waiver by the complainant of any right it had under the trust deed to object to the validity of the attempt to release these 30 lots in order to raise money to make payments of principal and interest long in arrears.

On page 99 *et seq.* of the brief for the trustee, it seems to be specifically charged that plaintiff is repudiating the contract by insisting that the trustee had no right under the contract to mutilate the entirety of plaintiff's security for the unpaid purchase money, as the trustee insists it has done. This charge is founded upon the fact that plaintiff retains the money paid to it by Blochman on June 30, 1913, and October 15, 1913, through the trustee, on overdue payments. Counsel declare:

> "We insist that plaintiff cannot, while it retains this money, deny the right of any of the defendants to releases of lots, or the authority of the trustee to make them."

The brief declares that the plaintiff's theory to the contrary "is so repulsive to every instinct of justice, that it should not for a moment be entertained."

We must, however, adhere to this theory, however repulsive it may seem to the trustee, or to any or all of the other defendants.

We ask, did the plaintiff do anything wrong in receiving these payments? Was it not in the contract, immediately following the paragraphs containing provisions permitting the subdivision and containing the covenant, in that case to expend at least $25,000 in improvements; and, the paragraph that when so subdivided, the beneficiary might make sales, and in such case, on payment of the stipulated sums to the trustee, it might execute deeds, provided as follows (Tr., p. 39-40):

> "Nothing herein contained shall be construed as extending the time for the payment of said one hundred twenty-five thousand dollars ($125,000) hereinbefore mentioned, but that said sum shall be paid as hereinbefore provided at all events."

Was not plaintiff entitled to these payments, even though no attempt had ever been made to subdivide? Certainly so.

Is it supposed that the contract obliges the plaintiff to return this money because the improvements were *not* made? The supposition is absurd. But to this result does this argument seem to come.

In the analysis of this contract, let the further inquiry be made: What security was there reserved in the contract for the performance of this covenant to improve in the contingency that Blochman elected to make and made the subdivision? It will be observed that the contract confers upon the plaintiff the power to declare the whole sum due, that is, to accelerate the maturity of all

installments of the purchase money, in but two cases. (Tr., pp. 40-41.)

1st. For taxes remaining unpaid after delinquent.

2nd. For any installment of the purchase price remaining unpaid when due.

There is no provision for declaring the whole purchase money due for failure to make the stipulated amount of improvements.

What security then was reserved in the contract for the enforcement of this covenant to expend not less than $25,000 which was made with both the trustee and the plaintiff?

The only security consistent with the survival of the contract, was the duty of the trustee to abstain from "executing deeds" while this covenant remained unperformed. For, as we insist, the trustee had no right to execute deeds for subdivisions of the tract so long as the improvements had not been made.

It was to sales by Blochman of lots in the tract *as so improved* to which plaintiff assented; and it was to the execution of deeds by the trustee of lots in the tract *as so improved* that the plaintiff assented; but it assented to nothing other and to nothing less—neither in making the contract nor at any time since.

Confessedly, Blochman and his Syndicate utterly failed in performing this covenant. What remedy or recompense do the defendants, including the trustee, hold out to plaintiff for this failure?

It seems that the remedy suggested is that the plaintiff return the payments made, we presume with interest—and that it take back this property encumbered by

a subdivision and by dedications to the public thereunder, which have destroyed the utility and marketability of the whole 40 acres.

We submit that the contract does not oblige the plaintiff to submit to this sort of a rescission and restoration. We have already discussed as fully as seems profitable the position that none of the persons who dealt with Blochman, or the Syndicate, respecting their equities under this contract, occupied any other or better position than Blochman, or the Syndicate itself.

It is submitted that plaintiff by nothing that it has done has waived its right to hold the trustee and all of the defendants to the terms of the trust declared in the trust agreement.

Plaintiff's lien for securing the purchase money is in the nature of an equitable mortgage.

Under the heading "Nature of the Instrument (Brief for trustee, pp. 39 *et seq.*), it is insisted that the trust agreement in this case "constituted a simple trust deed" as known to the law in this state, and that "plaintiff cannot enforce its rights under the instrument by proceeding in foreclosure as a mortgage", and a number of cases are cited on pages 39 and 40 to support the proposition. It is further said, on page 41, that "This action should fail in all other respects than as a direction to the trustee to complete the performance of the trust."

This subject was touched upon in the opening brief (page 48). We advert to it here, particularly in view of its bearing upon the contention that the powers of

the court are confined to directing the trustee to complete the performance of its trust, and the further contention that certain persons, in whose favor the trustee made Declarations of Trust, upon the order of Blochman or the Syndicate, or to whom it made sub-declarations upon the order of such immediate appointees of the original beneficiary, are not made parties defendant.

The security declared in the trust agreement is an equitable mortgage and not the typical "trust deed" as known to the law of California.

The typical trust deed as recognized by the series of decisions, commencing with *Koch* vs. *Briggs,* 14 Cal., 257, cited in the brief for the trustee, is described in the following extract from the opinion of the Supreme Court in bank in the case of *Warren* vs. *All Persons, etc.,* 153 Cal., 771-774, as follows:

> "That instruments conveying property as security for a loan, in trust, to sell in the event of nonpayment, or to reconvey to the grantor upon payment of the debt, create valid, express trusts is thoroughly settled in this state."

This is followed by a citation among other cases of, *Sacramento Bank* vs. *Alcorn,* 121 Cal., 379, which is included in the cases cited in the brief.

The distinction between this well-known form of security for loans, and the trust agreement here involved, is so plain that one feels like apologizing for arguing so self-evident a proposition. For,

1. This is not a loan, but a sale.

2. The grantor is not a lender but a vendor.

3. The premises in the question were not deeded to the trustee by the debtor to secure his debt; they were conveyed by the grantor, who is the creditor.

4. Upon payment of the debt the premises, by the terms of the agreement, are not to be reconveyed to the grantor, but are to be conveyed to the whilom debtor.

The only element which this transaction has in common with the true trust deed is that a debt existed and exists. It is in its essential elements, the case of a debt made pursuant to a sale, under which, by a contemporaneous writing made a part of the same transaction, a lien for the unpaid purchase money was reserved.

The intervention of the trustee to hold the title as security for the vendor's purchase money, and subject to that for Blochman, the purchaser, as to the whole equitable and beneficial interest, does not to the eye of equity obscure the real framework of vendor and purchaser.

To this sort of relation, the following, from 39 Cyc., 1792-3, is entirely applicable:

> "A lien for unpaid purchase money may be created by express contract in writing, which contract may be contained either in the conveyance itself or in a separate instrument. The lien thus reserved is not a technical vendor's lien, but a security in the nature of an equitable mortgage, the legal title passing to the purchaser subject to the lien."

See the following cases cited in the opening brief, page 48:

Shillaber vs. *Robinson*, 97 U. S., 68-78;

Guaranty Title Co. vs. *Green Cove R. R. Co.*, 139 U. S. 137, 142-3;

Earle vs. *Sunnyside Land Co.*, 150 Cal. 214, 227-8;

Hodgkins vs. *Wright*, 127 Cal. 688, 692, in which it is said:

> "Trust deeds, to secure payment of a debt, are an anomaly in our system, and are admittedly inconsistent with the policy of this state in regard to mortgages. It is at least doubtful if they would be now sustained but for a line of decisions made before they were very seriously questioned. In such case the doctrine will not be extended to deeds which are not expressly of that character. . . . . It has only been held that such deeds are not mortgages which require foreclosure. In effect they are mortgages with power to sell."

We submit, then, that this a full-fledged case of foreclosure of an equitable mortgage in which the plaintiff is under equity Rule 10 entitled to decree for any balance found due the plaintiff over and above the proceeds of sale.

We also submit that the jurisdiction of the court to grant full relief and to make complete disposition of the whole controversy is not to be cut down by any suggestion that it is limited by the power of sale created in the agreement. Upon this subject it is sufficient to refer to the emphatic repudiation of any such pretension in the case of *Guaranty Title Co.* vs. *Green Cove R. R. Co.*, *supra*, at pages 142-3.

None of the parties in whose favor these secret, unrecorded Declarations of Trust were made, are necessary parties to this suit; but are represented by the trustee who is the maker and the depositary of such Trust Declarations, and all such persons will be bound by the final decree herein.

It developed in the testimony in this cause at the hearing for the first time that there are certain persons in whose favor the Union Title and Trust Company had made the Declarations of Trust which are asserted adversely to plaintiff's security, which had been kept not only unrecorded, but secret.

No objection on the score was made at the hearing that such persons were not made parties, but some question is made by the trustee on this argument over the fact that these persons are not joined as defendants.

We submit that these secret holders of Declarations of Trust whether created at the instance of Blochman, or of the Syndicate, his transferee, or under them are not necessary parties in any point of view; moreover, that they will be bound by the final decree herein.

We submit that they will be bound by such decree:

First. Because this being an action to foreclose an equitable mortgage, and these Declarations of Trust not having been recorded before the commencement of this action, or at all, they fall under the operation of Section 726 of the Code of Civil Procedure of this State, in which is contained the following provision:

> "No person holding a conveyance from or under the mortgagor of the property mortgaged, or having a lien thereon, which conveyance or lien does not

appear of record in the proper office at the time of the commencement of the action, need be made a party to such action, and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance or lien as if he had been a party to the action."

Breedlove vs. *Norwich Union Fire Ins. Co.,* 124 Cal., 164;

Filipina vs. *Trobock,* 134 Cal., 441;

Hibernia Sav. Loan Asso'n vs. *Cochran,* 141 Cal. 653;

Agar vs. *Astorg,* 145 Cal., 548.

Second. All such persons holding Declarations of Trust from the Union Title Company, or the Union Title and Trust Company, will also be bound by the decree, because they are represented by the Trustee insofar as these new trusts are asserted adversely to the prior trust, in the same trustee, for plaintiff.

The case here presents an exception to the general rule that all persons materially interested in the result of a suit ought to be made parties; for the reason that, so far as these later trusts were undertaken by the trustee, adversely to or in violation of the trust already assumed by it for plaintiff, they are without right and void. (Civil Code, Sec. 2232.)

"No trustee, so long as he remains in the trust, may undertake another trust adverse in its nature to the interest of his beneficiary in the subject of the trust, without the consent of the latter."

This case is covered by the decision in *Vetterlein* vs. *Barnes*, 124 U. S., 169.

In that case, in the course of the opinion, there is approved the following from *Rogers* vs. *Rogers*, 3 Paige, 379, which will suffice to show the point decided:

> "As a general rule, the *cestuis que trust*, as well as the trustee, must be parties, especially where the object is to enforce a claim consistent with the validity of the trust. But where the complainant claims in opposition to the assignment or deed of trust, and seeks to set aside the same on the ground that it is fraudulent and void, he is at liberty to proceed against the fraudulent assignee or trustee, who is the holder of the legal estate in the property, without joining the *cestuis que trust*."

Third. If these later trusts had been asserted simply as junior encumbrances or interests, instead of adverse and superior interests, the several *cestuis que trust*, if they had not concealed themselves with the trustee and had recorded their Declarations, would still not be necessary, as distinguished from proper parties.

We note again that the record shows no objection for want of parties made, by motion or answer; nor any objection otherwise made at the hearing of the cause. Indeed, in view of the admitted refusal of the trustee to disclose who were the declarantees of these secret subtrusts, it may, at the time of the hearing, have seemed to the trustee to be somewhat indelicate to object that these new *cestuis que trust* were not joined as defendants. At all events, the case stands here with no objection made on this score, seeing that no objection was made by mo-

tion or answer by the trustee in whom these trusts were made to repose. If any equitable reason could have been given therefor the Court had full power "to make a decree saving the rights of absent parties". (Equity Rule 44).

But, inasmuch as the trustee, who now submits the elaborate argument as representing these sub-trusts, did not see fit to make any objection of any sort, before or at the hearing, to the non-joinder of its new sub-beneficiaries, there seems to be no reason for vexing the plaintiff with that matter at this late stage of the case.

Upon the whole case, we most respectfully submit that the plaintiff is entitled to the relief as stated in the closing paragraph of the original brief.

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NOTE—We make the following corrections of errors in opening brief as printed, to-wit:

On page 10, line 11, for "April *23*, 1913," read "April *30*, 1913".

On page 50, line 2, for "41 Atl." *360-367*" read "*366-367*".

On page 66, line 16, for "*or* subsequent sales" read "*of* subsequent sales."

On page 68, line 14, for "since the mortgagor could *not* pay or tender" etc., read "since the mortgagor could pay or tender" etc.